Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.*

Supplementary Brief of H. B. M. Consul-General at New York, Appellee.

Filed by Permission of the Court.

I.

THE COMPLAINT OF MARCH 31 IS NOT IDENTICAL WITH THAT OF MARCH 16.

The complaint of March 31, 1903, charges the appellant, in addition to what is contained in the complaint of March 16, "that he did also, at the times mentioned in the complaint, then being a director and manager of said company, with intent to defraud, alter

and falsify books, papers and writings belonging to the said Company, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said Company, and did also at the same time, then being a director of said company, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books or accounts and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company, and other persons."

These charges are within and made under the provisions of Section 83, of Chapter 96, of 24 and 25 Victoria, a copy of which is contained on page 12 of the original brief. The offenses thus additionally charged, while not conceding they are not within subdivision 3 of Section 611 of the New York Penal Code,—are clearly within Section 514 of the New York Penal Code, which reads as follows:

> "Section 514.—Other causes of forgery in the third degree. A person who either (1) being an officer or in the employment of a corporation, association, partnership or individuals, falsifies or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of account, records or other writings belonging to or appertaining to the business of the corporation, association or partnership or individuals, * * * is guilty of forgery in the third degree."

It seems to us that it was the manifest purpose in the use of the words "made criminal by the laws of both countries," to simply leave open for determination the question, Are the acts charged a crime in ~~either~~ Both countries? If they are a crime in both countries, no matter by what name called, then they are intended to be within the treaty. That in England it is called "fraud by a director," and in New York "forgery," is

not of the slightest consequence so far as the application of the treaty is concerned. The only question before the Court is, Are the acts charged against the appellant a crime in England, and also a crime in New York? That such acts constitute a crime in England, is conceded by the argument and brief on behalf of the appellant; and the only open question, apparently, is, Are these acts a crime in New York?

This would seem, from the citations from the Penal Code, to be removed beyond a doubt, and the additional charges contained in the complaint of March 31, would constitute the crime of forgery in the third degree, if they had been committed in New York.

The appellant, on page 3 of his brief, in reply to the Solicitor-General, makes the suggestion that the Court should here determine and hold that the appellant is not extraditable for the offense contained in the complaint of March 16, although he may be under the additional charges contained in the complaint of March 31. We submit that this would be going beyond the point to which this Court has limited its power of review in these cases, as cited in the original brief; that, there having been no examination in this case,—*i. e.*, the testimony upon the examination not being before the Court,—the Court limits its review to the question of the jurisdiction of the commissioner, and if any of the offenses charged in the second complaint are extraditable, then the commissioner had power to issue the warrant, and this Court will leave the further determination of the extraditability, on the facts, to the Commissioner.

II.

THE OFFENSES CHARGED AGAINST THE APPELLANT IN THE COMPLAINT OF MARCH 16 ARE WITHIN SUBDIVISION 3 OF SECTION 611 OF THE NEW YORK PENAL CODE, AND WITHIN THE TREATY; SECTION 611 IS CONTAINED IN CHAPTER XI, TITLE XV, WHICH IS ENTITLED, "FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS IN THEIR MANAGEMENT."

The word "knowingly," as used in this section, is defined by the Penal Code. Section 718, entitled "Construction of Terms" provides as follows:

> "In construing this Code, or an indictment or other pleading in a case provided for by this Code, the following rules must be observed, except where a contrary intent is plainly declared in the provision to be construed, or plainly apparent from the context thereof * * * (4) the term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission."

We submit that the New York statute, so far as the making of a false report is concerned, is equivalent to what is contained in the English statute. We cannot see much distinction between knowingly concurring in making a written report, exhibit or statement * * * containing any material statement which is false, and making or concurring in making a written statement or account "which he shall know to be false in any material particular."

Without trying to follow the counsel for the appellant in the fine distinctions he attempts to draw between the

New York statute and the English statute,—surely a person charged in New York with the offense as charged in the complaint in this proceeding would be subject to the provisions of Section 611 of the New York Code.

III.

A STATE IS CONSIDERED A COUNTRY, WITH REFERENCE TO CERTAIN CONDITIONS.

In Dicey on Domicile, page 31, the author says:

> "The word 'country' has, among its numerous significations, the two following meanings, which require to be carefully distinguished from one another. (1) A country, in what may be called the political sense of the word, means the whole of the district or territory subject to one sovereign power, such as France, Italy, the United States, or the British Empire. (2) A country, in what may be called the legal sense of the word, means a district or territory which, whether it constitutes the whole or a part only of the territory subject to one sovereign, is the whole of the territory subject to one system of law,—such, for example, as England, Scotland, or Ireland, or as each of the States which collectively make up the United States."

IV.

BAIL.

It was a rule at common law, that an escape while at large on bail, upon re-arrest, was sufficient reason for refusal to re-enlarge on bail.

The appellant's situation is not unlike that of a person who has forfeited his bail. He has fled from the jurisdiction of the country whose laws he has violated, and did not touch the soil of this country, except in custody, under extradition proceedings.

There are difficulties in these international extradition cases in the matter of bail, that cannot arise in others. If bail is taken and the bond forfeited to whom is the penalty to belong. A demanding government would not be asked to accept in lieu of the person to be surrendered, the amount of money represented in the bond.

If the accused is charged with a felony, he must be personally present at the examination, and an enlargement on bail and escape would end the extradition proceedings until re-capture. In this particular case there have been no unreasonable delays in the prosecution of the proceeding, as the case has been ready to be submitted to the Commissioner since April 15, so far as the prosecution is concerned.

V.

THE DECISION IN THE WINDSOR CASE HAS CEASED TO BE CONSIDERED IN THIS COUNTRY, AS A REASON FOR REFUSING EXTRADITION.

This case was decided almost forty years ago, since that time, there has been in both countries, a much more liberal view of the purpose of treaties of extradition, but particularly in the United States, and in a case, recently decided, the Judge in the Court below, in answer to a contention that reciprocity was or ought to be the rule in these proceedings, gave expression substantially to these views.

At one time it seemed to be the theory that the sole foundation of the practice depended upon reciprocity,

and that if some particular country were backward about returning our criminals, we would be keen to keep theirs. At last, however, it seems to have been discovered that the foreign criminal was not a particularly valuable acquisition, and that although it might be highly desirable, that offenders against our laws should be brought back here and tried, as a deterrent example, it was probably more important that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied they were criminals.

CHARLES FOX,
Of Counsel for H. B. M.
Consul-General, Appellee.